Supreme Court, U.S.

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NO. _____

IN THE

Supreme Court of the United States

October Term, 1993

MARK CONVERTINO

Petitioner/Appellant,

v.

E. B. WRIGHT, JR., WARDEN,
Greenville Correctional Center;
ATTORNEY GENERAL OF THE
COMMONWEALTH OF VIRGINIA,

RespondentsAppellees.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When it is reported to the trial court PRIOR TO THE VERDICT in a criminal case that the twelve jurors and two alternate jurors have been discussing the evidence during the trial, do the Sixth and Fourteenth Amendments to the Constitution of the United States require the trial court to investigate to discern if prejudice to the defendant has occurred?

LISTING OF ALL PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

1. The parties to the proceeding in United States Court of Appeals for the Fourth Circuit are the same as the parties who appear in the caption of this case.

2. The parties to the proceeding in the Supreme Court of Virginia, whose judgment is sought to be reviewed, were Mark Convertino, Appellant, and the Commonwealth of Virginia, Appellee.

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MARK CONVERTINO,

Petitioner/Appellant,

v.

E.B. WRIGHT, JR., Warden,
Greenville Correctional Center;
ATTORNEY GENERAL OF THE
COMMONWEALTH OF VIRGINIA,

Respondents/Appellees.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

To The Honorable Chief Justice and the Associate Justices of the Supreme Court

Mark Convertino, by counsel, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

LIST OF OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS DELIVERED BY OTHER COURTS

1. Denial of petition for appeal by the Court of Appeals of Virginia, April 23, 1992.

2. Order and accompanying memorandum denying Appellant's application for a Writ of Habeas Corpus by the United District Court, Eastern District of Virginia, Richmond Division dated May 25, 1993.

3. Unpublished pur curiam opinion by the United States Court of Appeals for the Fourth Circuit dismissing the appeal from the United States District Court for the Eastern District of Virginia, at Richmond.

No reports of opinion accompanied any other court orders.

STATEMENT OF GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT IS INVOKED

1. The date of the dismissal of the Appeal from the United States District Court for the Eastern District of Virginia, at Richmond by the United States Court of Appeals for the Fourth Circuit was November 12, 1993. This is the Judgment sought to be reviewed.

2. The United States Court of Appeals for the Fourth Circuit denied Appellant's Petition for Rehearing and Suggestion for Rehearing in Banc on January 25, 1994.

3. The statutory provision believed to confer on the Supreme

Court jurisdiction to review the Judgment in question by Writ of Certiorari is 28 U.S.C. §2254.

CONSTITUTION PROVISIONS INVOLVED IN THE CASE

1. Article 6 of the Amendments to the Constitution of United States:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

2. Section 1 of Article 14 of the Amendments to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE CONTAINING THE FACTS MATERIALS TO THE CONSIDERATION OF THE QUESTION PRESENTED

On May 21, 1991 in the Circuit Court for the City of Portsmouth, Virginia, a jury found Mark Convertino guilty of murder in the first degreee of one Gina Habit. The jury recommended that Mr. Convertino be sentenced to thirty-two (32) years in the state prison. The trial court imposed this

sentence on July 16, 1991.

The jury verdict came at end of the fourth day of trial, the jury having begun its deliberations that afternoon after three and one- half days of evidence. Prior to the jury retiring to for deliberation, the Court dismissed the two alternate jurors. One of those alternate jurors, Michelle Ford, was questioned by a newspaper reporter in hearing range of the prosecutor and defense counsel. She told the reporter that the jurors had not understood until the end of the second day of the trial that they could not talk about the evidence. She said the jurors (including the alternates) talked about the case during that time and had made

"conjectures" about the evidence.

Counsel for Mr. Convertino brought this information to the trial judge, repeated for the record what Michelle Ford had stated, and requested a mistrial. The Court stated that it wanted to see what happened with the jury and would take no action before the verdict. (Trial transcript May 29, 1991 pp. 641-646).

Prior to the jury's announcement that it had a verdict, the trial judge was forced to absent himself for personal reasons and a second judge for the Circuit Court for the City of Portsmouth was called to preside. Since the first judge had ruled that no action on the reported juror misconduct would

be taken until after the verdict, Counsel for Convertino requested the second judge to examine the jurors individually concerning their premature discussion of the evidence if a guilty verdict were returned. The second judge refused this motion. (Trial transcript May 29, 1991 pp. 646-648). After the jury announced its verdict the jurors were discharged and never examined as to improper discussion of the evidence and any impact such discussion may have had.

Counsel for Mr. Convertino deposed the two alternate jurors weeks later and they confirmed the jurors had commented on evidence during the course of the trial (including one of the alternates).

The two alternates remember quite different comments made by the jurors, which included a negative comment about Mr. Convertino's expert witness. On July 16, 1991, the trial court (the first judge) refused to grant a mistrial and failed to take any action to discern the extent of the juror misconduct and its impact on the jurors prior to their entering the jury room for deliberation.

In his Petition for Appeal in the Court of Appeals of Virginia, Mr. Convertino requested the Court of Appeals to rule whether the trial court erred in not investigating the effect of the jury misconduct reported to it (question No. 7 - Questions Presented - Petition for

Appeal in the Court of Appeals of Virginia).

In his Petition for Appeal in the Supreme Court of Virginia Mr. Convertino in his Assignment of Error number 6 requested the Court to find that the trial court had erred in its refusal to investigate the effect of juror and alternate juror misconduct upon the verdict.

ARGUMENT

Winebrenner v. U.S. 147 F.2d 322 (1945) Cert. Den. 65 S. Ct. 1197 (1945) offers instruction on just how far the trial court violated Mr. Convertino's right to an impartial jury and his right to due process.

In Winebrenner the jurors understood in a criminal case they could discuss the case among

themselves. The Court in Winebrenner noted that "it is not until the final submission of the case that the jurors are told that a defendant is under the law presumed to be innocent and not guilty and that the presumption attends him throughout the trial, so that it is incumbent upon the government to prove the guilt of the defendant beyond a reasonable doubt. These instructions are of vital importance as fixing standards to be allowed by the jury in determining the guilt or innocence of the defendant. If however, the jurors may discuss the case among themselves, either in groups of less then the entire jury or with the entire jury, there are given premature consideration to the

evidence. By due process of law it is meant a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial. The jury should not discuss the case among themselves because, first, they have not heard all the evidence; second, they have not heard the instructions of the Court as to how this evidence is to be considered by them; and neither have they heard the arguments of counsel."

The Court continued, "now the human mind is constituted so that what one himself publicly declares touching any controversy is much more potent in biasing his judgment and confirming his predilection than similar declarations which he may

hear uttered by other persons. When most men commit themselves publicly to any fact, theory, or judgment they are to apt to stand by their own public declarations in defiance of evidence. This pride of opinion and consistency belongs to human nature".

The Court continued that "... defendants were entitled to have the case considered not by divisions or coteries of jurors which might include the alternate jurors but by the entire jury." 147 F 2nd at 329.

In Commonwealth of Pennsylvania v. Kerpan 498 A.2d 829 (1985) The Court held that premature jury discussions of the evidence are prohibited. "First, since the prosecution's evidence is presented

first, any initial opinions formed by the jurors are likely to be unfavorable to the defendant and there is a tendency for a juror to pay greater attention to evidence that confirms his initial opinion ... Second, once a jury declares himself before his fellow jurors he is likely to stand by his opinion even if contradicted by subsequent evidence ... Third, the defendant is entitled to have his case considered by the jury as a whole, not by separate groups or cliches that might be formed within the jury prior to the conclusion of the case ... Fourth, jurors might form premature conclusions without having the benefit of the Court's instruction concerning what law they

are to apply to the facts of the case ... Fifth, jurors might form premature conclusions without hearing the final arguments from both sides."

Appellant submits that whether a trial court allows jurors to talk prematurely or, as in his case, jurors ignore the admonishment of the Court not to talk and talk anyway, the same result is had: jurors prematurely discussing the evidence may well taint the impartiality the Constitution demands of them and cause the proceeding to depart from the requirements of due process.

Even the Court of Appeals for the Fourth Circuit in Stockton v. Commonwealth of Virginia, 852 F 2d

740 (1988) seems to agree. In that case it found conversations between three jurors sharing a ride to and from the Courthouse during the trial did not constitute improper deliberation "absent evidence that this sub-group deliberated merits of the case."

The decision of the trial court, the Virginia Court of Appeals, the Supreme Court of Virginia, the United States District Court for the Eastern District of Virginia, at Richmond, and the Court of Appeals for the Fourth Circuit all departed from dicta and direction from this Court in Tanner v. United States 483 U.S. 107, 97 L. Ed. 2d 90, 107 S. Ct. 2739 (1987). While Tanner stands for the

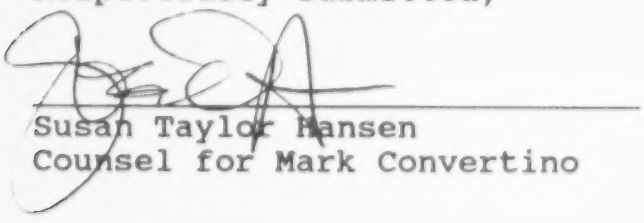
proposition that a jury's verdict will not be impeached by post verdict juror testimony, absent proof of an external influence, Justice O'Connor, speaking for the Court, indicated that the policy reasons for that rule would not apply when misconduct is reported to the Court BEFORE THE VERDICT. Tanner 97 L. ed. 2d 90 at 110. The clear implication of Tanner is that the Trial Court must investigate possible serious juror misconduct made known prior to the verdict.

It is clear from the various courts' rulings in this case that there is a need to clarify a trial court's obligations to due process when juror misconduct is reported to it prior to a verdict in a criminal

case. This Court should rule that the right of a defendant to a fair and impartial jury and to due process demands that, at a minimum, a trial court must determine whether premature juror discussions of the evidence have prejudiced the defendant when the report of premature discussion has been given the trial court prior to the verdict.

For these reasons Appellant prays that this Court will grant this petition for writ of certiorari.

Respectfully submitted,



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APPENDIX

A. Denial of Petition for Appeal, April 23, 1992, Court of Appeals of Virginia

B. Denial of Petition for Rehearing, May 18, 1992, Court of Appeals of Virginia

C. Denial of Petition of Appeal, August 21, 1992, Supreme Court of Virginia

D. Denial of Petition for Rehearing, September 18, 1992, Supreme Court of Virginia

E. Order denying Petitioner's Application for Relief pursuant to 28 U.S.C. § 2254, United States District Court for the Eastern District of Virginia, Richmond Division, May 25, 1993

F. Denial of Appeal from the United States District Court for the Eastern District of Virginia, at Richmond, November 12, 1993 United States Court of Appeals for the Fourth Circuit

G. Denial Petition for Rehearing with Suggestion for Rehearing of Banc, January 25, 1994, United States Court of Appeals for the Fourth Circuit.

PROOF OF SERVICE

I hereby certify that on this February 10, 1994 three copies of the foregoing Petition for Writ of Certiorari was mailed to Thomas C. Daniel, Assistant Attorney General, Supreme Court Building, 101 North Eighth Street, Richmond, Virginia 23219, attorney for the Respondents/Appellees telephone number (804) 786-2071.

Attorney

APPENDIX

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 23rd day of April, 1992.

Mark Convertino

against Record No. 2055-91-1
Circuit Court No. CR90-2536

Commonwealth of Virginia,

From the Circuit Court of the City of Portsmouth Before Judge Baker, Retired Judge Hodges and Godwin*

This petition for appeal is denied for the following reasons:

The trial court approved the jury's verdict that appellant is guilty of first degree murder and the use of a firearm in the commission of murder. We have reviewed the evidence and find it sufficient to support the judgment of the trial court.

Whether photographs are admissible

is a matter largely left to the discretion of the trial court. The picture complained of showed no more than the coroner did or could have testified to, therefore, no abuse of discretion is shown.

The evidence admitted relating to the victim's accomplishments was proper rebuttal to defense assertions of the victim's alleged deficiency.

Whether the victim believe she had AIDS, and if so, whether it caused her to commit suicide is speculative and too remote to the relevant issues at trial.

Nothing in the record discloses that the twelve jurors who weighed the evidence did not follow the trial court's instructions and reach their conclusions based on the law and evidence revealed to the _____ during the course of the trial. The unanimous verdict of the jury is the

best evidence of each juror's opinion of the case. Caterpillar Trucking Co. v. Hulvey, 233 Va. 77, 82, 353 S.E.2d 747,751 (1987). Nothing in this record impeaches the validity of their verdict.

The trial court shall allow court-appointed counsel the fees set forth below and also his necessary direct out-of-pocket expenses. The Commonwealth shall recover of the appellant the costs in this Court and in the trial court.

---

*Retired Judges William H. Hodges and James C. Godwin took part i the consideration of this case by designation pursuant to Code § 17-116.01.

A Copy,

Teste:

Patricia G. Davis, Clerk

By:
Deputy Clerk

Costs due the Commonwealth
by appellant in the Court of
Appeals of Virginia

Attorney's fee	$300.00 plus his costs and expenses
Filing fee	25.00

Teste:

Patricia G. Davis, Clerk

By:

Deputy Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Monday the 18th day of May, 1992.

Mark Convertino, Appellant,

against Record No. 2055-91-1
Circuit Court No. CR90-2536

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

Before Judge Baker, Retired Judges Hodges and Godwin*

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 23rd day of April, 1992 and grant a rehearing thereof, the said petition is denied.

---

*Retired Judge William H. Hodges and James C. Godwin took part in the consideration of this case by designation pursuant to Code §17-116.01.

A Copy,

Teste: _____
Patricia G. davis, Clerk

By: _____
Deputy Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 21st day of August, 1992.

Mark Convertino Appellant,

against Record No. 920960
Court of Appeals No. 2055-91-1

Commonwealth of Virginia,

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of hte argumenet submitted in support of and in opposition to the granting of an appeal, the Court refuses the petition for appeal.

The Circuit Court of the City of Portsmouth shall allow court-appointed counsel the fee set forth below and also his necessary direct out-of-pocket expenses. And it is ordered that the Commonwealth recover of the appellant the costs in this Court and in the courts below.

A Copy,

Teste:

David B. Beach, Clerk

By:
Deputy Clerk

Costs due the Commonwealth by appellant in Supreme Court of Virginia:

Attorney's fee	$150.00 plus his costs and expenses
Filing fee	25.00

Teste:

David B. Beach, Clerk

By:
Deputy Clerk

VIRGINIA:

IN THE SUPREME COURT OF VIRGINIA HELD AT THE SUPREME COURT BUILDING IN THE CITY OF RICHMOND ON FRIDAY THE 18TH DAY OF SEPTEMBER, 1992.

Mark Convertino,
Appellant,

against Record No. 920960
Court of Appeals
No. 2055-91-1

Commonwealth of Virginia,
Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 21st day of August, 1992 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

/s/ David C. Beach

Clerk

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MARK CONVERTINO,
Petitioner

v. Civil Action 93-51

E. B. WRIGHT, JR., Warden
Greenville Correctional Center
Respondent

ORDER

For the reason stated in the accompanying Memorandum, and deeming it just and proper so to do, it is hereby ADJUDGED and

ORDERED that Petitioner's application for relief pursuant to 28 U.S.C. Section 2254 be and the same is hereby DENIED.

Let the Clerk send a copy of this Order to all counsel of record.

UNITED STATES DISTRICT JUDGE

May 25, 1993
Date

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

MARK CONVERTINO,

Petitioner

v. Civil Action 93-51

E.B. WRIGHT, JR., Warden
Greenville Correctional Center,

Respondent.

MEMORANDUM

The matter is before the Court pursuant to Petitioner's motion for relief under 28 U.S.C. § 2254. On July 16, 1991, Petitioner was found guilty by a jury of first-degree murder and use of a firearm in the commission of murder. Subsequently, Petitioner received a sentence of thirty-two years imprisonment. Petitioner appealed his conviction to the Court of Appeals of

Virginia and the Supreme Court of Virginia, asserting constitutional challenges as to alleged juror-related improprieties. The Virginia appellate courts rejected both claims on their merits. After exhausting all potential state remedies, Petitioner thereafter filed the instant action with this Court. Jurisdiction is vested in this Court by virtue of 28 U.S.C. § 2254.

The facts pertinent to this matter are these. Subsequent to the close of the evidence, the trial court's instructions, final arguments, and upon retirement of the jury to deliberate, an alternate juror, Michelle Ford, stated to a newspaper reporter that the twelve regular members of the jury and the two alternates had discussed the evidence during the trial. Counsel for the defense moved for a mistrial on this

basis and asked that inquiry be made of the jurors as to the discussions. The court delayed acting upon this motion. Upon rendition of the guilty verdict, defense counsel asked the court to make inquiry of the jury as to the allegations of Ms. Ford, which the court refused to do. The trial court thereafter denied Petitioner's motion for a mistrial and a motion to set aside the verdict for lack of sufficient evidence.

At a deposition dated June 20, 1991, Ms. Ford stated that jurors understood the court's cautionary instruction not to talk to anyone to mean that jurors should not talk to anyone outside the jury panel. Jurors therefore talked about various aspects of the evidence until the end of the second day of trial whereupon they heard the court state that they should not talk among themselves. On

July 10, 1991, James C. Lassiter related similar occurrences in a deposition. In particular, Mr. Lassiter related that he told the other jurors that he possessed greater knowledge of guns than the others, and that he had superior knowledge as to the sounds emanating from different calibers.

Petitioner asserts two grounds for relief. First, Petitioner contends that his rights under the Sixth Amendment to the United States Constitution were violated during the first two days of trial when the twelve regular and two alternate jurors commented among themselves on the evidence. In support, petitioner proffers United States v. Chatman, 584 F.2d 1358 (4th Cir. 1978) and United States v. Virginia Erection Corp., 335 F.2d 868 (4th Cir. 1964).

The Court finds no merit in

Petitioner's contention. As a threshold matter, both cases cited in support by Petitioner, Chatman and Virginia Erection, are inapposite; in both cases the Fourth Circuit held that the trial court acted improperly when alternate jurors were permitted in the jury room subsequent to the submission of the case to the jury.[1] Here, the alleged involvement of the alternate jurors, who sat with the twelve regular jurors during the trial with the permission of both petitioner and respondent, came near the outset of the lengthy trial and well

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[1] Cf. United States v. Olano, 113 S. Ct. 1770 (1993), where the Supreme Court held that the presence of alternates in the jury room during deliberation did not amount to plain error when the alternates were instructed by the trial court that they could sit in on the deliberations but were not to participate.

before submission of the case to the jury. The Court is mindful of the potential problems arising from premature jury discussions with regard to the evidence. See Comm. of Penn. V. Kerpan, 508 Pa. 418, 498 A.2d 829 (1985) (cataloging the risks in such circumstances). However, on the basis of the record before the Court it does not appear that the intra-jury discussions here were of such a nature and extent as to warrant Petitioner relief.

In this regard, the Fourth Circuit's opinion in Stockton v. Comm. of Va., 852 F.2d 740 (4th Cir. 1988), cert. denied, 489 U.S. 1071 (1989), is instructive. In Stockton, Petitioner sought reversal of his conviction on the basis of alleged premature deliberations among jurors. In denying his claim the Court noted that the only such conversations were among

three jurors who shared a carpool and stated as follows:

> These conversations consisted in part of small talk about the manner in which the trial was being conducted and the appearance of certain witnesses. The question of defendant's guilt or innocence was not discussed .... It may also be unrealistic to think that Jurors will never comment to each other on any matter related to a trial. Even if these conversations violated the trial court's instructions to the jurors not to discuss matters relating to the trial, there is no evidence that the merits of the case were deliberated.

There was thus no prejudice to warrant a new trial.

Id. at 747 (emphasis added). The Supreme Court has stated a similar view

elsewhere:

> due process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically effect their vote.

Smith v. Phillips, 455 U.S. 209, 217 (1982).[2] In the case at bar, the alleged

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[2] See also United States v. Carmona, 858 F.2d 66 (2d Cir. 1988); United States v. Klee, 494 F.2d 394 (9th Cir.), cert. denied, 419 U.S. 835 (1974) ; Winebrenner v. United States, 147 F.2 322 (8th Cir.), cert. denied, 325 U.S. 863 (1945).

discussions occurred relatively early in the trial, during the first two days of a jury trial conducted May 23-29, 1991. Furthermore, the discussions amounted to idle conversation
regarding the testimony. No conclusions as to petitioner's guilt or innocence were reached. Indeed, Ms. Ford commented that she "did not get the feeling at all that people were biased in there, that they really wanted to get all the evidence, and they wanted to make a clear, sound decision.... " That Mr. Lassiter, arguably the most opinionated of the discussion participants, was not present for deliberations further diminishes the likelihood of prejudice.

In addition, there is no evidence in the record that the court's admonishment at the second day of the trial was not

heeded. See Francis v. Franklin, 471 U.S. 307, 324 n. 9 (1985) ("[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them."). Under the circumstances, therefore, no violation of the Sixth Amendment can be said to have occurred.

A second ground for relief asserted by Petitioner is that the trial court committed reversible error when, upon entertaining the defense motion for a mistrial due to the alleged premature deliberation, the court failed to inquire of the jury to ascertain whether prejudice occurred. Petitioner cites Virginia case law to the effect that when learning of possible prejudice to the

jury deliberation process, the court has an affirmative duty to investigate whether juror misconduct occurred. See Evans-Smith v. Comm., 5 Va. App. 188, 361 S.E.2d 436 (1987).

The Court discerns no merit in this claim. As stated long ago by the Virginia courts, "the testimony of jurors ought not to be received to impeach their verdict, especially on the ground of their own misconduct." Bull v..Comm., 55 Va. (14 Gratt.) 613, 632 (1857). This view predominates to this day; it is impermissible to impeach a jury's verdict on the basis of post-trial testimony absent evidence of an extraneous influence affecting the jury. See Tanner v. United States, 483 U.S. 107 (1987). See also Parker v. Gladden, 385 U.S. 363 (1966) (bailiff's comments as to defendant); Remmer v. United States, 347

U.S. 227 (1954) (bribe offered juror); Mattox v. United States, 146 U.S. 140 (1892) (jurors' reading and hearing of prejudicial evidence not admitted into evidence). In Evans-Smith, for instance, the Court of Appeals deemed improper a juror's consultation during deliberation of an almanac to ascertain the time of sunrise on a particular day, a fact that went to an ultimate issue in the case; therefore, the appellate court concluded that the trial court erred when it refused to investigate this external influence. Similar facts required the Virginia Supreme Court to set aside a conviction in Haddad v. Comm. of Va., 229 S.E.2d 325, 329 S.E.2d 17 (1985), a case also cited in support by Petitioner. In the case at bar, Petitioner asserts that "[Mr. Lassiter] speaking with the jurors about the evidence was no different than

a spectator approaching jurors during a recess to give expert opinion about evidence." The Court disagrees. Lassiter was indisputably a member of the jury panel, albeit an alternate member, who sat with the regular panel with the consent of Petitioner. As such, he cannot be said to be an "external" influence as that phrase is properly understood. Here, as discussed above, no external influence was injected sufficient to afford Petitioner relief.

In sum, Petitioner's request for relief under 28 U.S.C. § 2254 will be denied. An appropriate Order to this effect shall issue forthwith.

_____
UNITED STATES DISTRICT JUDGE

MAY 25 1993
Date

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Mark Convertino,
Petitioner-Appellant,

v. No. 93-6723

E.B. Wright, Jr., Warden,
Greenville Correctional Center
Attorney General of the
Commonwealth of Virginia,
Respondents-Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, At Richmond.
Robert R. Merhige, Jr., Senior District Judge. (CA-93-51)

Submitted: October 27, 1993

Decided: November 12, 1993

Before HAMILTON, LUTTIG, and WILLIAMS, Circuit Judges.

Dismissed by unpublished per curiam opinion.

COUNSEL

Gregory Michael Pomije, COOPER & DAVIS, Portsmouth, Virginia, for Appellant, Thomas Cauthorne Daniel, Assistant Attorney General, Richmond, Virginia, for Appellees.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (1988) petition. Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we deny a certificate of probable cause to appeal and dismiss the appeal on the reasoning of the district court. *Convertino v. Wright*, No. CA-93-51 (E.D. Va. May 25, 1993). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

DISMISSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED January 25, 1994

No. 93-6723
CA-93-51

MARK CONVERTINO

Petitioner - Appellant

V.

E.B. WRIGHT, JR., Warden, Greenville Correctional Center;
ATTORNEY GENERAL OF THE COMMONWEALTH OF VIRGINIA

Respondents - Appellees

On Petition for Rehearing with Suggestion for Rehearing In Banc

---

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/ Bert M. Montague
CLERK

93-6723

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